Connecticut State Medical Society
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Testimony in Opposition to House Bill 6687 An Act Concerning Certificates of Merit
Judiciary Committee
April 1, 2013

Senator Coleman, Representative Fox and members of the Judiciary Committee, my name is Michael Neubert. Thank you for the opportunity to provide this testimony to you on behalf of the more than 7,000 physicians and physicians in training of the Connecticut State Medical Society (CSMS) in opposition to House Bill 6678 An Act Concerning Certificates of Merit and its potential changes to Connecticut General Statute §52-190a and 52-592..

In 2005, I had the distinct honor to testify before this committee in support of C.G.S. §52-190a. At that time, the legislature was appropriately concerned about impact of medical malpractice litigation on physicians, the healthcare system and ultimately, patients. Those concerns ranged from rising malpractice premiums to physicians fleeing the state and abandoning certain practice areas, which would directly impact access to health care and quality of health care.

The situation was viewed as a crisis by many at the time, not just physicians. As a result, there was a strong contingent whom favored a cap on damages as one way to deal with the situation. Ultimately, the legislature decided to, adopting a reform package which preserved a patient's right to compensation through the tort system with no limit on damages and some sensible, modest restrictions on which cases would be allowed to proceed and be submitted to a jury. Like most sensible legislation, constituents on both sides of the issue, the physicians and the plaintiffs' bar, were not entirely happy with the outcome.

So, we need to ask ourselves what has happened since 2005 that would prompt the legislature to significantly change, if not gut C.G. S. §52-190a? Has the number of medical malpractice cases being filed been significantly reduced? No. I recall that last year a former president of the Connecticut Trial Lawyers Association testified that she believed the average number of medical malpractice cases filed annually had gone from approximately 300 to 280. Well, if that is the case, is that a reason to change C.G.S. §52-190a? I would suggest that the answer is no. If the hurdle of C.G.S. §52-190a even slightly reduces the number of dubious medical malpractice lawsuits being filed, then isn't it doing what it was designed to do? Has C.G.S. §52-190a resulted in clogging up our court dockets with Motions to Dismiss as claimed by the plaintiffs' bar? What is the proof of that? There is no evidence that supports that claim and in fact, if my firm's experience is any guide, Motions to Dismiss pursuant to C.G.S.§52-190a are filed in a small minority of medical malpractice cases. There was a time within the first few years following the passage of C.G.S. 52-190a when our firm, and I suspect other defense lawyers, were filing more Motions to Dismiss as we awaited guidance from the courts regarding its interpretation of 52-190a and as the plaintiffs' bar adjusted to the new statute.

The reality now is that most plaintiffs' lawyers understand what is required in order to comply with C.G. S. §52-190a and as a result filing a Motion to Dismiss has become the exception to the rule. In addition, various court decisions (Wilcox v. Schwartz and Morgan v. Hartford Hospital) interpreting C.G.S. §52-190a have made it easier for the plaintiffs' bar to meet the requirements

of the statute and more difficult for defendants to prevail on a Motion to Dismiss. In addition, the Plante v. Charlotte Hungerford Hospital decision opened the door for plaintiffs to re-file the case in those rare cases when a Motion to Dismiss is granted. It is my view that C.G.S. §52-190a is a good statute which is achieving what it was designed to achieve. Furthermore, as the plaintiffs' bar has adjusted to the statute in response to various appellate decisions, the impact on plaintiffs in medical malpractice cases has significantly diminished. In fact, one might make the argument that much like a new tax provision where after a while the accountants and tax attorneys have their clients make adjustments to lessen, if not eliminate, its impact – the plaintiffs' bar has adjusted as it should to the requirements of C.G.S. 52-190a. I would argue that is a good thing and now is not the time to lower the bar.

The other point that must be addressed is the argument that it is somehow fundamentally unfair or illogical to not allow a healthcare provider that may be allowed to testify pursuant C.G.S. §52-184c(d) to provide a written opinion pursuant to C.G.S. §52-190a. While this argument is appealing in its simplicity, it is badly flawed and short on analysis. . The circumstances under which a court rules that a witness is qualified to testify as an expert at trial pursuant is C.G.S.§52-184c(d) is vastly different from the limited analysis that a court uses to decide if an expert is qualified as a similar health care provider under C.G.S. §52-190a. At trial, defense counsel is afforded an opportunity to cross examine the witness, often outside the presence of the jury, regarding his or her alleged qualifications to serve as an expert when they fail to meet the definition of a similar health care provider pursuant to C.G.S. §52-1184c(b) or (c). In addition, even if the trial court allows that witness to testify, defense counsel can undermine that expert's credibility and qualifications before the jury. Whereas pursuant to C.G.S. §52-190a, defense counsel has no such opportunity to cross examine the anonymous author of the opinion letter and therefore, the court has to make that analysis without the benefit of information that a trial judge has when he or she makes that same decision. The situation the proposed amendment sets up is both fundamentally unfair and illogical. The present statute is working and the best proof of that is the plaintiffs' bar is working so furiously to, in effect, repeal it through amendment. Ironically, the new statute will not only lower the bar , but it will also lead defense lawyers to file significantly more Motions to Dismiss challenging the alleged qualifications of the anonymous author of the 52-190a opinion letter who does not meet the requirements of C.G.S. 52-190a subsection (b) or (c). Under the present statute, the judge merely has to compare apples to apples. Under the proposed legislation, the court will be put in the difficult situation of comparing apples to oranges, and trying to make that decision without the benefit of hearing the expert undergo cross examination. The watering down of the qualifications of the author of the opinion letter, as proposed, seems particularly unnecessary in light of the statute's provision allowing plaintiff's counsel to submit a new opinion letter within sixty days after a finding by the court that the original letter is deficient. What is the point of all this - to essentially remove any sensible precondition to filing a medical malpractice case and return to the early 2000s when there was a virtual medical malpractice crisis?

This leads me to my final comments regarding the proposed amendments to C.G.S. §52-592 contained in Raised Bill No. 1154, which ensure that plaintiffs will be able to re-file a medical malpractice action pursuant to the accidental failure of suit statute if it was dismissed pursuant C.G.S. §52-190a. What this means is that doctors could be living in their own version of the movie Ground Hog Day. Here is the scenario this proposed amendment sets up: a medical malpractice case against a physician is dismissed pursuant to C.G.S. §52-190a, despite the fact that plaintiff's counsel had been indulged 60 days to submit a new opinion letter. The case is then re-filed pursuant to C.G.S. §52-592, and again plaintiff's counsel fails to meet the

requirements of C.G.S. §51-190a. What happens? He can re-file again! When does this end for doctor? Never. How many bites at the apple are we going to give the plaintiff's bar?

In conclusion, it is clear, and might I add disturbing, that the combined effect of the proposed amendments to C.G.S. §52-190a and C.G.S. §52-592 is to gut the Certificate of Merit statute when there is no objective evidence that it has not achieved what it was designed to achieve. It may not be perfect, -- what legislation is? --and it is far better than what is being proposed. In addition, instead of reducing the number of Motions to Dismiss that are filed, it will significantly increasing the number of Motions to Dismiss being filed. Thank you for allowing me the time to address you regarding these very concerning bills.